Industrial Label Corporation *and* Graphic Arts International Union, Local 520. Case 17-CA-9763

April 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 19, 1981, Administrative Law Judge Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent did not violate Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by terminating Steven Dawes on June 20, 1980. The General Counsel excepts to this finding and contends that Respondent terminated Steven Dawes on June 20, 1980, because of his protected activities in violation of Section 8(a)(3) and (1) of the Act. We agree with the General Counsel. In so doing, we find no fault with the Administrative Law Judge's findings of fact and credibility resolutions, which we adopt. Our disagreement with the Administrative Law Judge lies in his analysis of the issues before him.

Since 1979, Dawes had been a press operator on Respondent's day shift, and was sometimes required to complete press runs on jobs which the night-shift operator had started. On June 19, 1980, the night-shift operator, Eileen LaVelle, left a job for Dawes to run. Dawes ran the job, but it was discovered that a significant error had been made, and the run had to be repeated. On the same day, Dawes saw LaVelle when she reported for the night shift. She told Dawes that she heard that the morning job had to be rerun. She then asked Dawes if he had obtained supervisory approval to run the job. He responded that he had done so. On the following day, June 20, Dawes was called to President Perelman's office and was asked in the presence of Vice President Peterson and Respondent's secretary whether he had obtained supervisory approval for the previous day's press run. Dawes truthfully told Perelman that he had not received supervisory approval. Perelman then asked him whether he had told LaVelle that he had received approval. Dawes then admitted that he lied to LaVelle explaining his action as being prompted by Peterson's earlier caution to avoid arguing with night-shift employees. Perelman discharged Dawes, stating that Dawes' dishonesty violated a company policy, and that Dawes had been warned earlier that if he lied he would be discharged.[1]

The Administrative Law Judge found, and we agree, that the General Counsel established a *prima facie* case of discriminatory discharge in violation of Section 8(a)(3) and (1) of the Act. He based his conclusion on the fact that Steven Dawes, as the sole union organizer in Respondent's printing facility, was engaged in protected activity. Dawes' union activity consisted primarily of distributing literature to employees on behalf of Graphic Arts International Union, Local 520 (hereinafter the Union), in support of the Union's campaign to represent Respondent's production employees. Dawes also carried a union organizing kit with him every day and had placed a union bumper sticker prominently on his car. In light of Dawes' conspicuous union partisanship, as well as certain specific behavior on the part of management, the Administrative Law Judge found that Respondent had knowledge of Dawes' protected activity. He noted two incidents in support of this conclusion. On June 18, Dawes used a telephone in Vice President Peterson's office, available to employees, to call the union president, Reginald Powers. In his conversation, Dawes informed Powers that he believed the Union now had enough votes to win the election. Peterson was standing near the doorway and heard this conversation. The following day the second incident occurred. At the end of his shift, Dawes was exchanging notes with a fellow employee, a deaf artist, in order to inform him of an upcoming softball game. Peterson entered the department where Dawes and the artist were standing and told Dawes to keep the "damned union crap" to his personal time.

The timing of Dawes' discharge was also a factor in finding a *prima facie* case. Thus, Dawes was discharged within 2 days after Vice President Peterson learned that Dawes thought the Union had sufficient support to win representative status

[1] There had been two earlier incidents in which Dawes had been accused of lying to President Perelman. The first incident occurred in July 1976, and concerned a job-related procedure. Dawes was threatened with a short disciplinary layoff but was ultimately found to have told the truth. The second incident occurred in December 1979. Dawes did lie concerning a medical examination but no discipline resulted. Respondent claimed that Dawes was warned at that time that he would be discharged if he lied again.

and within 24 hours of Peterson's disparaging remarks concerning Dawes' union activity.

The Administrative Law Judge then evaluated Respondent's explanation of Dawes' discharge as an action taken solely because Dawes lied when questioned by a fellow employee about a work-related matter. He noted first that Respondent's policy manual stated that "dishonesty" was automatic grounds for dismissal; second, that Dawes was personally aware of President Perelman's aversion to dishonesty; third, that Dawes had been warned earlier that if he lied, he would be discharged; and, fourth, that at the time Dawes was discharged, Perelman reminded him of the earlier warning.

Noting that the Board has stated that the existence of a reasonable explanation is not without relevance in determining the fact of discriminatory motivation,[2] the Administrative Law Judge limited his evaluation solely to the question of whether Respondent's basis for discharge was rational. He found that Respondent's decision, though questionable in its harshness, was not "devoid of rational justification," in light of Respondent's stated policy concerning dishonesty and the prior warning issued to Dawes.

Having found Respondent's justification to be rational, the Administrative Law Judge concluded that the decision to discharge Dawes is beyond the purview of the Board, because it involved "business judgment," and the Board is not free to question a managerial decision that is "rational on its face." It is his conclusion, in effect, that only upon a finding that an employer's justification is *not* rational may the Board look further to determine if the facts and circumstances of the case will support an inference of a proscribed reason for discharge.

The Administrative Law Judge applied the wrong analysis for a case of alleged discriminatory discharge. *Shattuck Denn Mining, supra*, addressed those cases where no rational explanation is advanced and cannot be read to support the position that the Board is precluded from further evaluation when an employer presents a rational basis for its action. To do so would permit a common pretext scenario to go unremedied—where an employer advances a legitimate business reason for a discriminatory discharge but, in fact, does not rely on it. We believe that this is such a case.

As noted earlier, the Administrative Law Judge correctly found that the General Counsel made a *prima facie* showing that Dawes' union activity was a motivating factor in Respondent's decision to discharge him. However, contrary to the Administrative Law Judge, we find that Respondent's asserted defense cannot withstand scrutiny.

Respondent introduced no evidence to show that the policy on dishonesty, cited as a basis for the discharge, was ever intended to reach the kind of dishonesty at issue here, a lie told by one employee to another which had no adverse effect on management. Two earlier situations concerning allegations of dishonesty on Dawes' part involved statements made directly to President Perelman. Even conceding that Dawes had been warned that another lie would result in discharge, no evidence was introduced to show that such a warning was intended to encompass Dawes' misrepresentation to LaVelle. When asked by management whether he had sought supervisory approval for the press run, Dawes was completely truthful. Further undermining Respondent's defense is Dawes' uncontroverted testimony that he had been instructed by management to avoid arguments with LaVelle and that he had lied to her to avoid just such an argument. In the very act that formed the basis of his discharge Dawes was complying with an earlier mandate from Respondent to "take any steps necessary" to avoid arguments with night-shift personnel.

Considered in the context of the extensive union activity engaged in by Dawes, Respondent expressed hostility to such activity, and the timing of his discharge coming on the heels of Respondent's first learning that the Union might be able to win representative status, Respondent's defense rings false. It would have this Board believe that lying to a fellow employee while telling the truth about the same matter to management is such an egregious offense that it warrants immediate discharge. While the position alone strains credulity, Respondent would further have us accept it in the absence of any evidence that its stated policy on dishonesty concerning work-related matters was intended to cover personal exchange among employees. In these circumstances, we are compelled to conclude that Respondent's asserted reason was not the actual reason for discharging Dawes, but was seized upon as a pretext to rid itself of the leading union adherent.[3] We therefore find that the General Counsel's showing of wrongful motivation is not rebutted and Respondent's discharge of Stephen Dawes violated Section 8(a)(3) and (1) of the Act.

[2] *Shattuck Denn Mining Corporation (Iron King Branch)*, 151 NLRB 1328, 1326 (1965), enfd. 362 F.2d 466, 470 (9th Cir. 1966).

[3] Thus, contrary to the Administrative Law Judge, we find this case presents "a clearly pretextual situation." Further, even assuming Respondent had established a legitimate motive, i.e., admittedly lying to an employee, Respondent clearly failed, considering the circumstances and the analysis above, to demonstrate that it would have discharged Dawes even in the absence of his union activity. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. The Respondent, Industrial Label Corporation, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Graphics Arts International Union, Local 520, is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully discharging Steven Dawes on June 20, 1980, and refusing thereafter to reinstate him, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that Respondent cease and desist therefrom and take appropriate affirmative action to effectuate the policies of the Act.

Respondent having discharged Steven Dawes on June 20, 1980, in violation of Section 8(a)(3) and (1) of the Act, we shall order it to offer Dawes immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any employee hired on or since June 20, 1980, to fill said position, and make him whole for any loss of earnings he may have suffered as a result of Respondent's acts, by payment to him of a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Industrial Label Corporation, Omaha, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Graphic Arts International Union, Local 520, or any other labor organization, by unlawfully discharging any of its employees or discriminating against them in any other manner with respect to their hire or tenure of employment in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Steven Dawes immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging, if necessary, any employee hired to replace him and make him whole for any loss of pay that he may have suffered by reason of Respondent's unlawful discharge of him as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Omaha, Nebraska, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER JENKINS, concurring:

I agree with the result reached by my colleagues, for the reasons stated below.

Employee Dawes worked as a day-shift press operator. Another employee, LaVelle operated the same press during the night shift. Sometimes

[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute the interest due on any loss of earnings suffered by Dawes by reason of Respondent's discrimination in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dawes would complete a press run on a job started by LaVelle. In February 1980, Dawes and LaVelle had a dispute regarding the cleanliness of their shared work area. Shortly thereafter, Respondent's vice president, Peterson, told Dawes to "take any steps necessary" to avoid arguments with LaVelle.

In March 1980, Dawes began a one-person organizing campaign for the Union among Respondent's employees. He distributed union literature, carried a notebook bearing the Union's logo, left the notebook in plain view at his work station, and placed union decals prominently on his automobile. In May 1980, the Union formally notified Respondent that an organizing campaign was underway.

During his morning break on June 18, 1980, Dawes telephoned the Union's president, Powers, from Peterson's office[6] to report on the status of the campaign. Dawes told Powers, *inter alia*, that, based on the number of signed authorization cards, Dawes thought the Union would win an election. Peterson, who unbeknown to Dawes had come to the doorway of the office, overheard this conversation. Upon being observed by Dawes, Peterson shook his head vigorously and walked away.

On June 19, Dawes completed a job which LaVelle had left on the press. The job turned out to have a significant error and had to be rerun. LaVelle learned of the error when she reported for the night shift. She asked Dawes if he had obtained supervisory approval prior to running the job. He responded that he had.

After finishing his shift that day, Dawes had an exchange of written notes with a deaf employee regarding a softball game. Peterson observed this exchange and directed Dawes to keep the "damn union crap" for his personal time.

The following day, Dawes was asked by Respondent's president, Perelman, whether he, Dawes, had obtained supervisory approval for the run left by LaVelle on June 19. Dawes truthfully replied that he had not received such approval. Perelman then inquired whether Dawes had told LaVelle that he had received approval. Dawes admitted that he had lied to LaVelle. He explained this action as being prompted by Peterson's earlier instruction to avoid arguing with LaVelle. Perelman then discharged Dawes, stating that Dawes' dishonesty violated a company policy and noting that Dawes had been warned that he would be terminated if he lied about a company matter again.[7]

The Administrative Law Judge concluded, and I agree, that the General Counsel made a *prima facie* showing that Dawes was discharged in violation of Section 8(a)(3) and (1) of the Act. This conclusion was based on findings that Respondent was aware of Dawes' conspicuous union activities, that Respondent discovered on June 19 that Dawes thought the Union could win an election, that Peterson revealed Respondent's union animus in his June 19 remark to Dawes, and that Dawes was discharged very soon after Respondent learned of the apparently successful union campaign and Peterson expressed antiunion sentiment.

The Administrative Law Judge, however, found merit in Respondent's contention that Dawes would have been discharged because he lied to LaVelle about a work-related matter, even absent his union activities. In so doing, the Administrative Law Judge rejected the General Counsel's argument that the incident underlying Respondent's asserted reason for Dawes' termination was so inconsequential that Respondent's reliance on that event was incredible. He found that Respondent had a published policy declaring that dishonesty was an automatic ground for dismissal, that Perelman had reacted in a distinctly negative manner on two prior occasions to Dawes' suspected or actual prevarications, that in December 1979 Perelman had threatened to discharge Dawes if Dawes lied again about a company matter, and that Perelman had relied on the December warning in terminating Dawes. He also noted that the General Counsel had provided no evidence that Respondent had applied its dishonesty policy to Dawes in a disparate manner and that Perelman's December 1979 warning occurred prior to Dawes' union activity. Thus, the Administrative Law Judge found that Respondent's discharge of Dawes, while questionable in its harshness, was not "devoid of rational justification" and that Respondent routinely enforced its dishonesty policy in reliance on Perelman's subjective interpretation of which actions violated the policy. He further found that the Board was not free to question the reasonableness of Respondent's discipline or to "second guess" Perelman's subjective determination that Dawes' lie to LaVelle fell

[6] Respondent allowed employees to use Peterson's telephone for personal calls during lunch and break periods.

[7] Perelman and Dawes had had two prior confrontations involving Dawes' veracity. In July 1976, Perelman accused Dawes of lying about the nature of work instructions previously given to Dawes. Perelman threatened to discipline Dawes if he had lied. Dawes had been truthful and he was not disciplined. In December 1979, Dawes suffered a back injury and was hospitalized. The attending physician recommended that Dawes rest for 8–10 weeks before returning to work. Perelman requested that Dawes seek a second opinion from Dawes' personal physician. Since Dawes was unable to see his own doctor, he consulted a local clinic physician, who confirmed the original diagnosis. Dawes reported this information to Perelman, but presented it as the opinion of his own doctor. Perelman had spoken to Dawes' personal physician, knew Dawes was lying, and confronted Dawes with this knowledge. After some discussion, Perelman told Dawes he would be terminated if he ever lied about a company matter again.

Respondent's policy manual, provided to all employees, contains a declaration that "dishonesty" will be considered an automatic ground for dismissal.

within the ambit of the policy. Based on all of the above, the Administrative Law Judge concluded that Respondent had met its burden of showing that Dawes would have been discharged for lying to LaVelle, even absent his union activities. I do not agree.

Respondent provided no evidence that Dawes' lie to LaVelle was covered by its published policy on dishonesty.[8] Nor did Respondent present any evidence that Dawes' June 1980 lie was the kind of misrepresentation that Perelman meant in his December 1979 warning.[9] Furthermore, contrary to the Administrative Law Judge, the nature of the incident assertedly relied upon by Respondent in its decision to terminate Dawes may be examined by the Board in its evaluation of Respondent's defense. An employer's magnification of an insignificant event into one of major proportions, which is then used to justify discipline, is evidence that the incident was not the actual reason for the discipline. See *Electri-Flex Co.*, 238 NLRB 713, 723, 725 (1978), enfd. 104 LRRM 2612 and 106 LRRM 2364 (7th Cir. 1979). Here, Dawes lied to LaVelle, a fellow employee with whom Respondent's vice president, Peterson, had instructed Dawes "to take any steps necessary" not to argue, and the lie was told to avoid an argument with LaVelle. When questioned about the same matter by Perelman, Dawes was completely truthful. Respondent does not assert that it was harmed by Dawes' action. By contending that Dawes' lie was covered by the dishonesty policy and the December 1979 warning, Respondent blew an inconsequential event out of proportion and then used it as a basis for Dawes' discharge. This exaggeration of a minor event casts further suspicion upon Respondent's asserted motivation for the discharge.

In light of the entire record, I find that Respondent's asserted justification for its discharge of Dawes does not withstand scrutiny.[10] Thus, I find that Respondent seized upon Dawes' lie to LaVelle as a pretext for terminating the sole union organizer among its employees, and thereby violated Section 8(a)(3) and (1).[11]

[8] Moreover, contrary to Respondent's published policy, it does not appear that Respondent "automatically" dismissed employees for dishonesty. Thus, in July 1976, Dawes was threatened with discipline, not discharge, and, in December 1979, he received only a warning.

[9] As Perelman failed to testify at the hearing, we have no direct evidence of what he meant by his December 1979 warning. The July 1976 and December 1979 incidents involving Perelman and Dawes demonstrate that Perelman was concerned with lies by an employee to the company president about work-related matters. There is nothing about these incidents, however, which indicates that Perelman's concern extended to lies told by an employee to a fellow employee.

[10] The failure of Respondent's asserted justification to withstand scrutiny provides additional support for the finding that Dawes' discharge was discriminatorily motivated. *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 469 (9th Cir. 1966), enfg. 151 NLRB 1328 (1965).

[11] Furthermore, even assuming *arguendo* that Dawes' lie formed a part of Respondent's motivation for terminating Dawes, I find that Respondent has not met its burden of showing that Dawes would have been terminated absent his union activities. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Graphic Arts International Union, Local 520, or any other labor organization, by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Steven Dawes reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

INDUSTRIAL LABEL CORPORATION

DECISION

STATEMENT OF THE CASE

MAURICE M. MILLER, Administrative Law Judge: Upon a charge filed on June 30, 1980, and duly served, the General Counsel of the National Labor Relations Board caused a complaint and notice of hearing dated August 5, 1980, to be issued and served on Industrial Label Corporation, designated as Respondent herein. Therein, Respondent was charged with the commission of unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395. Respondent's answer, duly filed, concedes certain factual al-

legations within the General Counsel's complaint, but denies the commission of any unfair labor practices.

Pursuant to notice, a hearing with respect to this matter was held before me on March 10, 1981, in Omaha, Nebraska. The General Counsel and Respondent were represented by counsel; Complainant Union was represented by an International representative. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence with respect to pertinent matters. When their respective testimonial presentations concluded, the General Counsel's representative and Respondent's counsel both briefly presented oral arguments. Since the hearing's close, briefs have been received from the General Counsel's representative and Respondent's counsel; these briefs have been duly considered.

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent raises no question, herein, with respect to the General Counsel's present jurisdictional claims. Upon the complaint's relevant factual declarations—more particularly, those set forth in detail within the second paragraph thereof—which Respondent's counsel concedes to be correct, and on which I rely, I conclude that Respondent herein was, throughout the period with which this case is concerned, and remains, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities affecting commerce, within the meaning of Section 2(6) and (7) of the statute. Further, with due regard for presently applicable jurisdictional standards, I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II. COMPLAINANT UNION

Graphic Arts International Union, Local 520, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits certain employees of Respondent to membership.

III. UNFAIR LABOR PRACTICES

A. *The Issue*

This case, which derives from a relatively simple, straightforward controversy, cognizable under the statute, presents a single question for resolution. The General Counsel contends that press operator Steven Dawes was discharged, and subsequently denied reinstatement, because he had "joined, supported or assisted" Complainant Union herein, and had engaged in concerted activity for the purpose of collective bargaining or other mutual aid or protection. (No further "independent" conduct subject to Board interdiction as statutorily proscribed interference, restraint, or coercion has been charged within the General Counsel's complaint herein.)

Respondent contends, contrariwise, that Dawes was terminated because he had concededly "lied" when queried with respect to whether a particular press run had been commenced and completed pursuant to some supervisor's required signatory "approval" which had neither been solicited nor given.

B. *Facts*

1. Background

a. *Respondent's business*

Respondent maintains a production facility wherein labels, required by various business and commercial firms, are printed. Seven printing presses are utilized currently, for this purpose; when this case was heard, an eighth press was inoperative.

When the situation with which this case is concerned developed, Respondent's total production complement compassed some 24 workers. Eighteen worked on Respondent's 7 a.m.–3:30 p.m. day shift; the remainder worked a night shift, which commenced at 3 o'clock. The firm's night-shift operations, however, were confined to four nights weekly.

Throughout the period with which this case is concerned, Sheldon Perelman functioned as Respondent's president; John Peterson was the firm's vice president in charge of production. Normally, both men provided Respondent with managerial direction during day-shift hours, solely.

b. *Complainant Union's campaign*

Complainant Union had, previously, represented Respondent's production workers, within some 1974–75 period never defined, precisely, for the present record. At some time during calendar year 1975, however, Complainant Union had "filed a disclaimer" wherein it had disavowed or relinquished its previously claimed representative status.

Commencing in late March 1980, Complainant Union had, nevertheless, commenced a campaign for renewed representative status, within Respondent's production crew. Some 2 months thereafter, on May 6, specifically, Complainant Union had—consistently therewith—dispatched a telegram, directed to Respondent, within which Respondent's management had been notified that a formal "organizing" campaign, calculated to win support for Complainant Union's prospective bid for renewed recognition, was in progress.

c. *Steven Dawes*

Throughout Complainant Union's proclaimed "organizational" campaign, press operator Steven Dawes had functioned as that organization's principal protagonist. He had distributed—so his testimony, proffered without contradiction, shows—campaign literature, plus some "thirty or forty" designation cards. By mid-May, 11 cards, signed by Dawes and 10 fellow workers, had been submitted to Reginal Powers, Complainant Union's president. No company workers, save Dawes personally, had

participated, so far as the record shows, in Complainant Union's designation card distribution.

2. The General Counsel's presentation

a. *Dawes' employment history*

Press operator Steven Dawes initially had been hired in November 1975; in March 1979 he voluntarily resigned. In September 1979, Vice President Peterson had solicited his return; Dawes had been rehired for the 7 a.m.—3:30 p.m. day-shift work. Like other day-shift workers, Dawes ran a press which likewise was operated during Respondent's night shift. Since the firm's scheduled night shift ran from 3 p.m. to 2 a.m. with 1 hour for lunch, that shift's first half hour coincided with the last half hour of Respondent's scheduled day shift.

Day-shift press operators sometimes were required to complete press runs on label print "jobs" which night-shift operators had started. When this happened, the night-shift press operator—specifically, one Eileen LaVelle, so far as Dawes' designated press was concerned—would leave a note describing the particular "job" which required completion, specifying the amount required, and describing any problems encountered, which the day-shift operator might, likewise, be required to handle.

Throughout some 5 months, following his September 1979 rehire, Dawes' working relationship with LaVelle, so far as the record shows, had been maintained without friction.

During February 1980, however, Vice President Peterson had—on one occasion—criticized LaVelle while Dawes was present, during their half-hour shift overlap, for presumably failing to keep her press area tidy. Directly thereafter, LaVelle had complained to her fellow press operator—during a purportedly "loud" conversation—that their shared press area had not been left "that way" when she left Respondent's facility the night before. And the next morning, Respondent's vice president—so Dawes' testimony, proffered without contradiction, shows—had declared his awareness regarding a reported "argument" between the press operators which had taken place the previous afternoon; Dawes had been directed, so his uncontradicted testimony shows, to "take any steps necessary" whereby arguments with his second-shift colleagues might be avoided, so that harmony within Respondent's shop might be maintained.

b. *Dawes' campaign in Complainant's behalf*

Previously, within this Decision, references have been made to Dawes' role as Complainant Union's principal protagonist within Respondent's facility. The press operator's testimony—which I credit in this connection—merits determinations: That during March 1980 he had joined Complainant Union; that, shortly thereafter, he had been given a black vinyl notebook "organizational" kit bearing Complainant Union's logo; that he had carried the notebook to an from work "almost" daily thereafter; and that he had kept the notebook, in open view, at his work station. Dawes' testimony further warrants determinations—which I make—that he had distributed union literature before work, within Respondent's plant "break room" during coffeebreaks and lunch periods, and within Respondent's parking lot following working hours, probably "six or seven" times. Throughout the period with which this case is concerned, Dawes' car—which he drove to work daily—had, so I find, carried visible union window decals, plus a union bumper sticker.

c. *Respondent's knowledge with regard to Dawes' campaign*

On Wednesday, June 18, during his morning "break" period, Dawes telephoned Reginal Powers, Complainant Union's president, so his testimony shows, from Respondent's shop. Their conversation, so Dawes testified, lasted some "four to five" minutes. (Respondent permits shop workers to use two telephones for personal calls, during their break periods. Since one telephone was busy, Dawes utilized the second, which was located in Vice President Peterson's shop office.)

The press operator, so his credible testimony shows, summarized his campaign's progress. Complainant Union's president, then, suggested that a meeting should be arranged, during which some representative of Complainant Union's parent organization could address Respondent's workers. Dawes mentioned a possible date, with which Complainant Union's president concurred. *Inter alia*, Respondent's press operator declared—so I find—that, considering the number of designation cards which had been signed, he "thought" Complainant Union would have enough votes to win representative status.

While this conversation was in progress, Dawes noticed Vice President Peterson, standing in the open doorway between his office and Respondent's next door art department. According to Dawes, Peterson was standing no more than 10 feet distant during the latter portion of his telephone conversation with Complainant Union's president; Peterson, so the press operator recalled, shook his head vigorously, and walked away directly.

Upon this record, the General Counsel's representative seeks a determination that Peterson *could have heard* part of the press operator's telephone conversation, and that he probably *indeed did hear* the conversation's conclusion. Respondent's vice president was never called to testify herein. Consequently, nothing within the present record, save for a challenging personal statement by Respondent's counsel, would preclude a determination—consistently with Dawes' testimony—that Peterson, while standing 10 feet distant, could have heard the press operator's report and comments, during the telephone conversation in question. I find that he could have done so. And Dawes' credible testimony regarding a subsequent, Thursday, June 19 contact with Respondent's vice president—which stands, herein, without contradiction—persuades me that Peterson did, indeed, hear some part of the press operator's telephone report.

During Respondent's Wednesday, June 18, lunch break, Dawes had notified some "eight or nine" workers, then present in Respondent's lunchroom, that a meeting would be held shortly thereafter, at "approximately 4:00

p.m. on a Monday afternoon" during which the shop's possible organization would be discussed.

On June 19, following his shift's conclusion, Dawes, so his testimony shows, was "communicating" with a deaf artist in Respondent's art department; the men were exchanging handwritten notes regarding a prospective softball game wherein both would be participants. While they were doing so, Respondent's vice president entered the department. According to Dawes, whose testimony—proffered without contradiction—merits credence within my view, Peterson directed him to keep the "damned union crap" for his personal time. However, so Dawes testified, nothing further was said.

d. *Dawes' discharge*

On Thursday, June 19, when Dawes reported for work, he had found a note which LaVelle, Respondent's night-shift press operator, had left. Substantially, Dawes thereby had been notified that a specific job, compassing a so-called "repeat" order for Sperry-Vickers, Respondent's customer, was ready to run. The note read, simply:

Steve. Got this set up + sample—good luck.

Dawes had, thereupon, run the job. At some point, later that day—never specified for the record—Vice President Peterson had discovered, however, that a significant error had been made, and that the press run would have to be repeated.

Later that day, shortly after press operator LaVelle reported for night-shift duty, Dawes had a brief conversation with her. His testimony, with respect thereto, reads as follows:

> Eileen had just left Mr. Peterson's office, and she asked me if I had heard anything about the job from the morning having to be rerun. I told her that I did. She then said that the note specifically said it must have supervisory approval, and then she asked if I had obtained supervisory approval from Bernie [Bernie Peters, Respondent's customer service manager] who was considered management. At that time I said that I had.

When queried specifically, herein, Dawes conceded, however, that he had neither sought nor received any management representative's signature approval for the Sperry-Vickers press run then in question.

The General Counsel's representative, herein, thereupon queried the press operator, with respect to why LaVelle had been vouchsafed a different response. The record, in this connection, reflects Dawes' responsive witness-chair reference to Vice President Peterson's February 1980 cautionary comment, previously noted herein. The press operator declared, testimonially, that—because of the way LaVelle's question had been put—he had concluded, *subjectively*, that a truthful response would start an argument, which he had been instructed to avoid.

Approximately one-half hour before Dawes' conversation with LaVelle, Vice President Peterson had questioned him specifically, so he recalled, with respect to who had "set up" the Sperry-Vickers job; Dawes had truthfully reported—so his credible, uncontradicted testimony shows—that LaVelle had done so.

The present record, considered in totality, warrants a determination, which I make, that LaVelle had "accepted" Dawes' representation, without question, particularly with regard to his purported procurement of supervisory approval for the press run; on that note, their conversation—so far as the record shows—had been concluded.

On Friday, June 20, however, Dawes' presence was requested in Sheldon Perelman's office, shortly before his shift's scheduled afternoon termination. When he reproted, the press operator found Vice President Peterson and Marlene Janda, Respondent's secretary, present. With respect to their conversation, Dawes testified, herein, that:

> Mr. Perelman pointed out to me that he had asked John and Marlene to be present to witness what was being said. He then questioned me about the Sperry-Vickers job and asked me if I had obtained supervisory permission to run the job. I said no. He then asked if I had told Eileen LaVelle that I had in fact received supervisory permission, and I said yes. *He then proceeded to talk about the union* [*sic*] *rule book covering dishonesty* . . . at which time I presented the note which had been left to me by Eileen . . . . And I mentioned that the reason I said [that I had received supervisory permission] was I felt I was following Mr. Peterson's instructions. *At that point he informed me I was discharged due to dishonesty.* And I pointed out that the job did not require supervisory approval because of the directive on repeat jobs. He again told me that I was discharged. [Emphasis supplied. Interpolation provided to promote clarity.]

Dawes then requested permission to remain in Perelman's office until his shift's conclusion, declaring that he felt embarrassed because he had never been discharged before. Permission was granted. At approximately 3:35, Dawes left Respondent's facility.

3. Respondent's defense

Confronted with Dawes' present record recitals, proffered to recapitulate the circumstances which had purportedly precipitated his termination, Respondent has presented no contradictory testimonial version. Neither President Perelman, who effectuated the press operator's discharge, nor Vice President Peterson, whose concern with regard to Dawes' conduct had presumably prompted Perelman's termination decision, testified. Respondent contends, however, that Dawes' presently proffered recollections—when reviewed with due regard for certain "background" circumstances which had purportedly prompted President Perelman's discharge determination—persuasively will show that the press operator's dismissal flouted no statutory mandate.

Previously, within this Decision, Dawes' direct testimony herein—that he was told he was being discharged for dishonesty—has been noted. When further questioned by the General Counsel's representative, with respect to whether Respondent's president previously had ever reprimanded him for dishonesty, the press operator prompt-

ly responded affirmatively. In this connection, Dawes testified: That, while at work on December 8, 1979, he had suffered a severe back sprain; that a physician, at the hospital to which he was taken, had—following an X-ray examination—recommended 8 to 10 weeks of rest before his resumption of work; that Vice President Peterson, upon being notified—the next day—that Dawes would not be returning to work forthwith, had directed him to telephone Respondent's president; that President Perelman thereupon had requested him to consult further with his personal physician; that he had promised he would do so; that his personal physician however, had, refused to see him, because his "past due" account for services previously rendered had, theretofore, been referred to a collection agency; that he then had consulted a local clinic physician, who had confirmed the hospital physician's diagnosis, while directing him to follow that physician's advice; and that:

> At that time I returned home and called Mr. Perelman and told him that I had, in fact, seen my own personal doctor and that Dr. Dietrich [Dawes' personal physician] had also supported the opinion of the first attending physician.

The press operator further declared that, pursuant to President Perelman's December 10 request, he had visited Respondent's plant the following day; that Respondent's president had, then and there, recapitulated a prior direct contact with his (Dawes') personal physician, during which he had learned that the press operator had not seen that particular physician the previous day; and that Perelman had, further, reported he was "very upset" because Dawes had lied to him. When queried by Respondent's president with respect to why he had lied, the press operator had declared—so his direct testimony herein shows—that he had been "embarrassed" because he had been required to consult a clinic physician. Respondent's president, so Dawes testified, then had suggested that he consult still another physician. That physician—when consulted—had, likewise, confirmed the hospital physician's prior "back strain" diagnosis; had, likewise, suggested a possible 8- to 10-week convalescence period; had prescribed drugs for the press operator's pain; and had given Dawes a note confirming his diagnosis and recommendation. With matters in this posture, Dawes had presented the physician's note. He testified that Respondent's president had, thereupon, declared he was sorry he had "yelled" during their previous confrontation, and that he could "understand" the "embarrassment" which Respondent's press operator might have suffered, when required to concede that he had gone to some clinic.

When questioned further, Dawes initially denied that President Perelman previously had *ever* told him he would be terminated if he lied again. Directly thereafter, however, the press operator testimonially recalled that he had, substantially, been so advised, during a prior *July 1976* confrontation concerned with some job-related problem.

With respect thereto, Dawes recalled that President Perelman had, following certain questions, called him an "outright" liar; that Perelman had, however, promised to confer with Vice President Peterson, following Peterson's return from a vacation, to determine whether he (Dawes) really had misrepresented certain job-related instructions which Peterson had, prior to his departure, purportedly given; that Respondent's president had, further, declared that—following his promised investigation—he would determine whether the press operator deserved a *short disciplinary layoff*, or possibly some apology; that Peterson, however, had—some 3 weeks later—confirmed the truthfulness of Dawes' questioned report, concerning his instruction; and that, consequently, he (Dawes) had not been disciplined.

Respondent's press operator, however, never categorically testified—while a witness herein—that President Perelman specifically had, during their *July 1976* confrontation, threatened him with "termination" should he lie thereafter.

With matters in this posture, Dawes was confronted, *during cross-examination herein*, with a record transcript, wherein certain proceedings conducted before a designated Appeal Tribunal of the Nebraska State Department of Labor, concerning the press operator's claim for unemployment compensation following his June 20 termination, had been stenographically reported. *Inter alia*, Respondent's president therein had detailed the circumstances which, from his point of view, had prompted Dawes' discharge; further, President Perelman had, by way of background, recapitulated the December 1979 job injury developments—previously referred to herein—which had, allegedly, contributed to his termination decision. During the Nebraska Appeal Tribunal's session—*so that hearing's transcript reveals*—Dawes had conceded, when confronted with President Perelman's recapitulation of the circumstances which had preceded and prompted his discharge, that "basically most of the things that Mr. Perelman [had] said" were true. And, *while a witness herein*, Dawes testimonially conceded that he had, indeed, made the comment reported, during the Nebraska Tribunal's hearing.

With matters in this posture, Respondent's contention—that Dawes' presently recapitulated testimonial concession, noted, should be considered a significant admission, sufficient to raise substantial questions regarding the probative worth of his *direct testimony*—previously summarized herein—requires some comprehensive references to President Perelman's testimony before the Nebraska Tribunal's administrative law judge. *Inter alia*, Respondent's president had, therein, testified with regard to Dawes' June 19 Sperry-Vickers press run. With respect thereto, Perelman's proffered recollections—set forth in relevant part below—had been reported as follows:

> When the job was finished the second shift press operator reported to work and was informed by Steve that the job had to be rerun because it had been run wrong . . . Mr. Dawes told the night-time operator that the job had been okayed by Bernie Peters who is our office manager. . . . He then left work that day. John Peterson, after Steven had left, brought the job up to me and explained that the job had been run wrong and had to be scrapped. I

asked what had happened and he said that Bernie had okayed the job and that the job was wrong. I questioned then, Bernie Peters, who supposedly had okayed the job, and was quite upset because the job was a—a $350 error . . . Mr. Peters told me that he had never signed off from the job . . . I then went back to our production area and pulled the production samples as it is customary, number one, that Steve Dawes was required to have all jobs signed and, number two, that whenever jobs are signed they are initialed on the back of the—the beginning of the run . . . . There were no initials on the—on the job . . . . The following day, I called Mr. Dawes into my office along with John Peterson, Marlene Janda and myself . . . I questioned Steve and asked him if he had the job okayed. He said he had made a mistake that he had not had the job okayed. I asked him if he had made the statement that Bernie Peters had okayed the job. He said, "Yes, I said that Bernie had okayed the job but I had made a mistake he had not okayed the job." *I asked him if he had lied, he said yes, he had lied. I then told him that he had lied to me once previously and at that time I had informed him if he had ever lied again that he would be automatically dismissed as it is a written part of our policy manual that dishonesty is automatic dismissal.* [Emphasis supplied.]

At this point the company president's reported testimony before the Nebraska's Appeal Tribunal's judge reflects his personal recapitulation of the December 1979 *contretemps*, described for the present record by Dawes, consequent upon the press operator's back injury. Perelman had recalled, so the Nebraska Tribunal's record shows, Dawes' confession that he had misrepresented a purported visit to his personal physician. With respect thereto, Respondent's president had declared, testimonially, that:

I was extremely upset because of his lying about the incident. There was no need for a lie and told him that if he ever lied again he would be automatically dismissed, that we would not tolerate such actions by our employees . . . I reminded Steve at our meeting on June 20 of what had transpired at our previous meeting, told him that we would not tolerate dishonesty and lying and *that he was being dismissed not because he had run the job wrong, which was a costly mistake, but that he had lied about the job.* [Emphasis supplied.]

Dawes, so Perelman's testimony before the Nebraska Tribunal shows, thereupon had declared that he "thought" the job had been given supervisory approval, because Respondent's night-shift press operator had left him a note stating that the job had been approved. According to Perelman's testimony before the state claims tribunal, LaVelle's note—when produced—had contained no reference to supervisory approval; Dawes had countered—so Perelman recalled—with a comment that he had "assumed" such approval had been given. The press operator then allegedly had commented further that LaVelle and he did not "get along" well. With matters in this reported posture, Perelman's testimony—before Nebraska's Claims Tribunal—had concluded as follows:

I reiterated that that had nothing to do with it. The fact that he had made a statement that Bernie Peters had okayed the job. That he had willfully lied were grounds for termination and I dismissed him. [Emphasis supplied.]

In relevant part, this constituted President Perelman's testimony before the Nebraska Appeals Tribunal, which Respondent's discharged press operator had—*then and there*—concededly characterized as "basically" correct, while prosecuting his unemployment compensation appeal.

Having elicited, herein, Dawes' concession that he had, *before the Nebraska Tribunal's administrative law judge*, previously confirmed the basic correctness of President Perelman's testimonial recitals, Respondent's counsel, thereupon, queried Dawes further—before me—with respect to President Perelman's purportedly declared rationale for his termination. With respect thereto, the *present* record reveals:

Q. (By Mr. Bruckner) Did Mr. Perelman tell you on June 20, to the effect that, "You have lied to me again and I told you the last time when you lied to me that if you did it again that it would not be tolerated. If you did it again you would be discharged," did he say words to that effect?

A. No.

Q. Let the record show that it took the witness 40 seconds to respond to that answer, [sic], what did Mr. Perelman say on June 20th?

JUDGE MILLER: The record will so show . . . .

Q. (By Mr. Bruckner) What did Mr. Perelman say on June 20, about your lying to me again?

A. He stated that I had in fact lied to another employee and for that was being discharged.

Q. Had you lied to another employee?

A. Yes.

Then, when queried further by Respondent's counsel, Dawes specifically conceded, *herein*, that, indeed, he had "lied" to LaVelle, particularly, when he told her that Office Manager Peters had "O.K.'d" the Sperry-Vickers press run. And, though he *denied* lying to some representative of *Respondent's management*, he conceded that, during their June 20 conversation, President Perelman had been *told* that he had lied to Respondent's second-shift press operator. The record *herein* reflects Dawes' further testimony, when cross-examined by Respondent's counsel, as follows:

Q. And wasn't this what he was upset about . . . Isn't this what he told you that he was upset about?

A. No.

Q. What did he say he was upset about?

A. He was upset that I had lied period.

Q. *After he told you back in September, [sic], if you ever lied about a company matter again, you would be discharged, isn't that what he told you on the 20th?*

> A. *Yes, and he also at that time said that he would write up a note for my personnel file and I would have to sign it when I returned to work with a note from the doctor.* [Emphasis supplied.]

Upon this record, Respondent now, contends, that Dawes really was terminated solely for his conceded misrepresentation that "supervisory approval" had been procured for his Sperry-Vickers press run. And, in that connection, Respondent's counsel seeks a determination, specifically, that Dawes' patently self-contradictory testimony in direct and cross-examination herein—*considered in totality*—will, without more, persuasively support a determination that President Perelman's previously proffered recollections with regard to his discharge decision—which had been detailed before a Nebraska Appeals Tribunal judge—merit credence. More particularly, Respondent's counsel, herein, relies on the press operator's *final testimonial concession, in this proceeding* noted above, that—when he was discharged—the firm's president had specifically cited his (Perelman's) prior December 1979 declaration that, should Dawes ever lie regarding a company matter again, he would be terminated.

C. *Discussion*

1. Questions presented

Within her brief, counsel for the General Counsel's representative characterizes Respondent's claimed reliance on Dawes' conceded misrepresentation, purportedly to justify his discharge, as patently "incredible . . . totally unbelievable . . . mind boggling . . . ridiculous" and reflective of the firm's determination to grasp at straws, when called upon to define its rationale for the press operator's termination. In short, the General Counsel contends that the reason given for Dawes' dismissal was clearly pretextual.

This case, however, presents no clearly pretextual situation. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Therein, the Board noted that:

> [W]here an adminstrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer *either did not exist or were not in fact relied upon.* [Emphasis supplied.]

Neither finding would be warranted on this record. Respondent claims, merely, that its press operator "lied" when queried by his night-shift colleague, with respect to whether he had secured supervisory approval to run the "repeat job" which had been readied for him. And, while a witness, herein, Dawes did testify that he had, indeed, reported his receipt of supervisory approval, when—in fact—such approval had neither been solicited nor received. The press operator thereby specifically has conceded that the particular misrepresentation on which Respondent's president purportedly relied, when effectuating his discharge, indeed had been communicated. And Perelman's consistently maintained *reliance, in fact*, on Dawes' acknowledged misrepresentation, merely, cannot be doubted.

The press operator's testimonially proffered recollections clearly reveal that Respondent's president had, specifically, referred to his confessed "lie" merely when he was terminated; other possible rationales which might have been relied on to justify or require his discharge then had been specificaly disclaimed. And Perelman's testimony before the Nebraska Appeals Tribunal with respect to Dawes' unemployment compensation claim—*which the press operator had, contemporaneously, characterized as basically correct*—clearly shows that he then was relying on Dawes' conceded misrepresentation, nothing more, to justify his personal discharge decision. Finally, Respondent's proclaimed position herein—though proffered, indirectly, through counsel—again reflects Perelman's consistently maintained reliance on the press operator's confessed prevarication, when required to state Respondent's reason for the latter's termination.

Respondent presently proffers neither "shifting" nor "alternative" claims, herein, that Dawes was dismissed, either for failing to get supervisory approval before running the Sperry-Vickers job or for completing that press run without noticing the mistake which, subsequently, persuaded Respondent's management that the labels processed would have to be redone.

With matters in this posture, the General Counsel's representative—within my view—presents a presumptively archetypal case for disposition consistent with this Board's recently formulated *Wright Line* principles. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). Therein, the Board declared that—with respect to possible "dual motive" cases wherein 8(a)(3) discrimination has been charged—the burdens of persuasion borne by the General Counsel and a respondent employer would be defined at 1089 as follows:

> First, we shall require that the General counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Consistently with this decisional rubric, Respondent seeks a determination, herein, that the General Counsel's required *prima facie* case has not been established. And, further, Respondent's counsel suggests that—from a reading of the record—this Board could "easily" conclude that Dawes' discharge would have taken place even absent his supposedly protected conduct.

2. The General Counsel's case

Upon this record, however, reliable, substantial, and probative evidence—sufficient to make out the General Counsel's required *prima facie* case, within my view, despite Respondent's contrary contention—clearly has been provided.

The press operator's testimony, that he functioned as Complainant Union's sole protagonist and designation card solicitor within Respondent's facility between

March 1981 and the date of his termination, really has not been challenged herein. While functioning in that capacity, clearly he was engaged in statutorily protected conduct.

Considered in totality, the present record, within my view, further will warrant a determination that Respondent's management representatives were fully cognizant with respect to Dawes' role in Complainant Union's renewed organizational campaign. A conclusionary factual "inference" that they were, throughout, knowledgeable with regard to his union leaflet and designation card distribution program indeed would seem practically compelled. Respondent's reported two-shift, 24-member employee complement manifestly qualifies the firm's facility—within my view—for a descriptive "small plant" designation; this Board has long held that—when confronted with union leaflet distributions and designation card solicitations conducted *openly* within such a plant—management's knowledge with respect thereto may, reasonably, be deduced. Compare *Five Star Air Freight Corporation*, 255 NLRB 275 (1981), and cases therein cited. Upon this record, certainly, there can be no doubt that Dawes' campaign for Respondent's unionization was pursued *openly*. His motor car—which he drove to work daily, and left within a parking lot closely proximate to Respondent's plant entrance—carried a state AFL-CIO sticker, plus a union window decal, together with a prounion bumper strip located "directly" next to his brake light.

The suggestion, within Respondent's brief, that Dawes' testimony in this respect should be considered suspect, because his described "bumper" sticker had not been *physically removed* so that it could be produced at the hearing herein, or because it *literally* could not be found located on his car's rubber bumper strip, merits characterization as disingenuous, within my view.

The press operator's repeated leaflet and designation card distribution—before work, within the firm's designated "break" room during both coffeebreaks and lunch periods, and within Respondent's parking lot directly after work—hardly could have escaped management's notice. Further, Dawes' notebook bearing Complainant Union's logo—which, so I have found, he kept in plain view, during his workday, near his press—hardly could have been overlooked throughout his sustained 3-month campaign in that organization's behalf.

These *factual inferences*—which within my view the record fully will warrant particularly with respect to Respondent's knowledge regarding the press operator's union sympathies and course of conduct—stand persuasively buttressed by Dawe's credible, uncontradicted testimony with regard to Vice President Peterson's manifest reactions, when he presumably "overheard" part of the press operator's June 18 telephone conversation, previously noted, and, subsequently, when he observed the press operator's June 19 written "communication" session with a deaf fellow worker. With respect thereto, Dawes' proffered recollections clearly provide something more than collateral support for *relevant factual inferences* regarding the state of Respondent's knowledge; they provide *direct evidence* that the press operator's superior had become cognizant of his role as Complainant Union's protagonist within Respondent's establishment.

Respondent's counsel, within his brief, cites Dawes' prior failure to mention Peterson's purported physical reaction when he (Peterson) presumably overheard the press operator's June 18 report to Complainant Union's president within his prehearing sworn statement given to a Board investigator. Further, counsel cites the press operator's failure to mention Peterson's June 19 remark, presumably sparked by his observed "conversation" with Cahill, either when he (Dawes) testified before the Nebraska Appeal Tribunal or when he proffered his sworn Board statement, herein noted. Having observed the press operator's generally straightforward, somewhat ingenuous, witness-chair demeanor, however, I remain satisfied that his testimonial recitals, with respect to Peterson's successive nonverbal and verbal reactions, do no reflect recent fabrication, that his previous failures to mention them should not be considered sufficient to dictate a rejection of his testimony, and that his presently proffered recollections, with respect to both manifestations chargeable to Respondent's vice president merit credence.

Before the Nebraska Appeal Tribunal, Vice President Peterson conceded Respondent's knowledge derived from Complainant Union's May 6 telegram, with respect to Complainant Union's organizational campaign. Since Dawes, so far as the record shows, had functioned and continued to function throughout as Complainant Union's sole leaflet and designation card distributor, since he functioned without attempting concealment, and since his efforts compassed solicitations confined to no more than 23 fellow workers within a relatively small establishment, Respondent's present contention, that General Counsel has not persuasively demonstrated management's knowledge with respect thereto, must be rejected.

True, the General Counsel's representative herein has not demonstrated a pervasive union-related "animus" chargeable to Respondent's management. For a time, Complainant Union had represented Respondent's employees; nothing within the present record would warrant a determination that some demonstrated managerial reluctance to comply with the firm's collective-bargaining responsibilities had contributed to, prompted, or forced Complainant Union's quondam withdrawal of representation. And save for Dawes' discharge, challenged herein, no statutorily proscribed reactions to Complainant Union's present organizational campaign currently have been charged. While testifying before the Nebraska Appeals Tribunal judge, in support of his unemployment compensation claim Dawes conceded that, prior to his June 20 termination, he had not felt "mistreated" because of his organizational activities.

Nevertheless, the press operator's testimony certainly will warrant determinations, which I have made, that he was terminated within 2 days after Respondent's vice president learned, presumably for the first time, that Dawes *thought* Complainant Union had developed sufficient support, within the firm's work force, to win representative status, and less than 24 hours after Peterson's first disgruntled manifestation suggestive of Respondent's

knowledge with respect to his (Dawes') union sympathies. The record in this respect, though certainly not strong, suffices, within my view, to establish the General Counsel's required *prima facie* case the Dawes' protected conduct may have been a cognizable "motivating factor" with regard to his termination.

3. Respondent's defense

With matters in this posture, further inquiry must focus on the credibility of Respondent's proffered exculpatory rationale for the press operator's discharge. The firm simply contends, that he was terminated solely for "lying" when queried by a fellow worker regarding a matter of managerial concern. Under *Wright Line*, then, some determination must be reached with respect to whether upon this limited record Respondent has satisfied its burden of persuasion that Dawes would have been considered subject to discharge for proscribed "dishonesty" based on his conceded misrepresentation to press operator LaVelle, even absent his participation in statutorily protected conduct.

Substantially, the General Counsel contends, in this connection, that Respondent's proffered justification for Dawes' dismissal should be considered insufficient to satisfy the firm's burden of persuasion, since it might *reasonably* be designated "incredible . . . totally unbelievable . . . mind boggling . . . ridiculous" and reflective of management's readiness to grasp at straws. The General Counsel's representative suggests that the press operator's purported "dishonesty" had been manifested in connection with a plant situation which, dispassionately and fairly considered, *reasonably* could have been deemed "absolutely" insignificant. In short, the General Counsel's representative, within her brief, seeks a determination—contrary to Respondent's contention—that Dawes could not have been terminated, for a dereliction which she would characterize as palpably inconsequential, absent his participation in statutorily protected conduct. She seeks such a determination upon several grounds:

First, counsel for the General Counsel's representative points out that Dawes concededly was discharged for a misrepresentation directed not to some managerial superior, but merely to press operator LaVelle; Respondent's president, therefore, must have known—so General Counsel presumably would suggest—that Dawes deliberately had not sought to mislead company supervisors.

Second, counsel for the General Counsel's representative cites the press operator's claim—presented to President Perelman before his discharge—that he had lied, when queried by LaVelle, solely because he wished to forestall a possible argument with her, regarding the instructions which she claimed she had given him, since Vice President Peterson previously had directed him to avoid such disputes; therefore, Respondent's president—so General Counsel would presumably suggest—should have considered Dawes' misrepresentation a mere tactical maneuver, without meaningful consequences so far as plant operations were concerned, which might, compassionately, have been deemed excusable.

Third, counsel for the General Counsel's representative contends—consistently with her view of the record herein—that Dawes, together with his fellow press operators, had been authorized to handle staightforward "repeat" jobs, like his June 19 Sperry-Vickers press run, without procuring prior supervisory approval. Proceeding from this premise, the counsel for the General Counsel's representative would argue that Dawes' conceded misrepresentation, with respect to his purported procurement of such approval, concerned a matter completely devoid of *substantive* significance; she suggests that his handling of the Sperry-Vickers press run, though carried to a conclusion without a supervisor's prior permission, had flouted no managerially imposed limitation.

Substantially, the General Counsel seeks a determination that—since Respondent's management properly could not blame Dawes for setting up the Sperry-Vickers press run incorrectly or for handling that straightforward repeat job on his own authority—the firm's president chose to make a mountain out of a molehill, when he terminated the press operator for a clearly "innocuous" comment directed to a fellow employee. From this, the General Counsel's representative presumably would argue that President Perelman's fundamental "anti-union" motivation legitimately may be deduced.

On its face, the General Counsel's contention—that Respondent's defensive presentation should not be considered sufficient to overcome his representative's *prima facie* case—cannot be cavalierly dismissed. Respondent proffers no claim, herein, that Dawes' conceded misrepresentation consciously and deliberately had been communicated *directly* to some management representative, so that he might escape being blamed for a production mistake. Rather, the firm contends—without specifically proffering any supportive rationale—that:

> [T]o lie about a mistake or to cover it up cannot be tolerated in any business. Had Respondent overlooked the lie or allowed it to go unpunished, it would have resulted in a bad precedent . . . .

In short, Respondent essentially contends that a given employee's conceded or proven "dishonesty" with respect to some matter of company concern may legitimatize his discharge, from management's point of view, whether such dishonesty may have been manifested in dealings directly with management or merely with some fellow worker, and regardless of whether the concerned employee's misrepresentations dealt with some work-related situation of major or minor importance.

With regard to this contention, certain comments by Trial Examiner Penfield, found in *Shattuck Denn Mining Corporation (Iron King Branch)*, 151 NLRB 1328, 1336 (1965), enfd. 362 F.2d 466, 470 (9th Cir. 1966), which this Board subsequently adopted, and which the court of appeals, inferentially, found apposite, may be worthy of note. Within this decision, Trial Examiner (later Administrative Law Judge) Penfield observed that:

> *The existence of a reasonable explanation for the discharge . . . is not without relevance in determining the fact of discriminatory motivation* which is, of course, the central issue which confronts the Board in this proceeding. *Failure to advance a rational explanation does not of itself establish that another reason exists,*

> *but it suggests such a possibility for employers do not ordinarily discharge competent employees without some compelling cause.* It suggests a pretext, and prompts a further examination of the record to ascertain if it discloses *anything else that might be regarded as the underlying reason,* and, if so, a consideration of whether such reason be unlawful. [Emphasis supplied.]

Herein, consistently with Trial Examiner Penfield's suggested approach, Respondent's presentation, calculated to satisfy its burden of persuasion, would seemingly require some preliminary demonstration that its proffered justification for Dawes discharge should be considered rational. And, then should that proffered justification be deemed worthy of characterization as excessively harsh, lacking in fairness, or patently unreasonable, Respondent would presumably be required to demonstrate, minimally, that President Perelman's discharge decision, nevertheless, did not derive from some statutorily proscribed underlying reason, *clearly inferable* from the "total circumstances" or "surrounding facts" disclosed within the present record.

Upon this record, Respondent's reaction to Dawes' conceded misrepresentation with respect to his purported solicitation or receipt of supervisory "approval" concerning the Sperry-Vickers press run—when considered with due regard for its situational context—might well merit characterization as harsh, or conceivably less than just; nevertheless, it can hardly be deemed—within my view—devoid of rational justification. My conclusion, in this respect, rests upon determinations:

First, that Respondent's policy manual, which the firm allegedly routinely provides for all plant employees, concededly contains, within its compilation of basic company rules, the declaration that "dishonesty" will be considered a so-called *automatic* ground for dismissal.

Second, that, twice previously, Dawes had, personally, been notified—during successive periods of service in Respondent's hire—with respect to President Perelman's distinctly negative "upset" reactions, when confronted with suspected or discovered employees misrepresentations, relative to matters of company concern.

Third, that, some 6 months before the press operator's termination, he further had been specifically warned—following his discovered misrepresentations regarding a claimed doctor visit—that, should he "lie" regarding a matter of company concern thereafter, he would be discharged.

Fourth, that, on June 20, when Dawes was finally terminated, he indeed was reminded with respect to President Perelman's prior warning, regarding his possible discharge, should he be discovered lying, thereafter.

With matters in this posture, Respondent's determination that the press operator's conduct merited characterization as "dishonesty" sufficiently egregious to warrant his discharge—though it may have been rationally reached, without being snatched from the empyreal blue—may conceivably be questionable. However, this Board, functioning within its proper statutorily defined sphere, cannot be called upon, despite the General Counsel's presumptively contrary suggestion, to render a judgment with respect to whether Respondent acted reasonably and fairly, or reacted with draconian harshness; such judgments—without more—will not resolve the question herein presented for disposition. Compare *N.L.R.B.* v. *T. A. McGahey, Sr., T. A. McGahey, Jr., Mrs. Altie McGahey Jones and Mrs. Wilda Frances McGahey Harrison, d/b/a Columbus Marble Works,* 233 F.2d 406, 412–413 (5th Cir. 1956). Therein, this Board was particularly admonished, *inter alia,* that:

> The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate . . . then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the *real motivating purpose* is to do that which Section 8(a)(3) forbids. [Emphasis supplied.]

See likewise *N.L.R.B.* v. *Eastern Smelting and Refining Corporation,* 598 F.2d 666, 673 (1st Cir. 1979), cited in *Texas Instruments Incorporated* v. *N.L.R.B.,* 637 F.2d 822 (1st Cir. 1981); therein the court of appeals noted that, when cases involve "business judgments" this Board should not set up its own standard and then conclude that, since the employer had another, it was *ipso facto* suspect. In short, when a concerned employer persuasively demonstrates that his challenged discharge decision reflects a reaction, rational on its face, with respect to some recognized managerial problem, that decision retrospectively cannot be stigmatized as statutorily proscribed, when the "total circumstances proved" will merely warrant a Board determination—bottomed upon some trier of fact's presumptively objective disinterested view—that the concerned employer's stated motive should be deemed less than reasonable. Cf. *Shattuck Denn Mining Corp.* v. *N.L.R.B., supra at* 470. The relevant "surrounding facts" bearing upon the challenged discharge must, rather, persuasively point to that stated motive's falsity.

No such showing, sufficient to warrant a determination that President Perelman's declared motive for Dawes' discharge was "objectively" false, can be found within the present record. The press operator's conceded dereliction—within the contemplation of some disinterested observer—conceivably might be deemed a peccadillo devoid of major significance. There can be no doubt, however, that President Perelman did consider it sufficiently serious to warrant a disciplinary reaction.

Counsel for the General Counsel's representative, herein, seeks a determination, bottomed primarily on Dawes' testimony, that—sometime previously—he, together with his fellow workers, had, through a memorandum notice, been generally authorized to process repeat press runs, which did not require changes, without requesting or procuring prior supervisory approval; proceeding from this claimed factual premise, the General Counsel would argue that Perelman's purportedly serious view of the press operator's misrepresentation justifiably could not have been maintained. Upon this record, however, no factual determination—that Dawes, *particularly*, had been given permission to process repeat orders without supervisory approval—would, within my view, be warranted; the press operator's claim that he was never "required to get supervisory approval" when handling repeated label runs stands in the record without circumstantial support, and carries no persuasion. Specifically, I note, in this connection, Dawes' concession, herein, that when supervisory personnel were "in the plant" and "available" he *voluntarily* would solicit their approval with respect to repeat jobs; his reasons for requesting their "O.K.," however, have not been detailed. Further, I note that, when testifying—during his Nebraska Appeals Tribunal hearing previously mentioned—with regard to Respondent's purportedly memorialized general policy on repeat press runs, the press operator reported, *inconsistently with his presently proffered claim*, that Vice President Peterson had previously declared a desire to "see all work that [he] turned out" during his first few weeks back at work, following his September 1979 return. While a witness, herein, Dawes did claim that, during his June 20 conversation with President Perelman, he had "pointed out" that the Sperry-Vickers job had not required supervisory approval, within his view, because of Respondent's previously promulgated memorandum directive relative to repeat orders which press operators had O.K.'d personally. That memorandum notice, however, had not really given the firm's press operators *carte blanche* permission to process simple repeat orders without supervisory approval. And Respondent's directive had specified, *inter alia*, that repeat order labels, when O.K.'d by press operators personally, should "include" their initials and date. Dawes never claimed—during his June 20 confrontation with Respondent's president—that samples of his Sperry-Vickers press run had borne his initials, signifying that he had, legitimately, processed the label run without a superior's concurrence, pursuant to Respondent's general authorization previously granted. And, subsequently, when confronted with Perelman's testimony—during his Nebraska Appeals Tribunal hearing—that "no initials" whatsoever had been found on his production samples for the Sperry-Vickers label run, the discharged press operator had proffered no timely contradictory claim. Likewise, I find, *the record herein* reflects Dawes' continued failure to claim, even now, that he had personally "initialed" production samples for the designated label run, conformably with Respondent's promulgated requirement. He concedes that he had merely "assumed" without checking that LaVelle had previously initialed them. Finally, I note that—*when questioned by Respondent's counsel, herein*, with respect to whether he had, shortly before, solicited a former carpool mate and fellow worker, Sarah Dore, to testify that he "did not have to have supervisory approval" when running repeat jobs—the press operator recalled, initially, that he had merely queried her with respect to whether "*she was aware that I needed supervisory permission*" to handle such press runs. After testifying with regard to Dore's negative response, Dawes was cross-examined further; he finally reported that his former fellow worker had declared she could not testify "*that she was personally aware that I had permission*" to run simple repeat jobs without a superior's concurrence. With matters in this posture, Dawes' testimony—considered in totality—provides no "reliable, probative and substantial" basis, within my view, for a determination that his Sperry-Vickers press run had really been properly handled, within the scope of his delegated authority. The press operator's uncorroborated testimony—which I have, herein, found larded with questionable discrepancies, partially vitiated by narrative lapses, marred by a Freudian slip of the tongue or possible semantic confusion, and devoid of circumstantial confirmation—cannot constitute substantial evidence. See *DeLorean Cadillac, Inc.* v. *N.L.R.B.*, 614 F.2d 554, 555 (6th Cir. 1980); *F. W. Woolworth*, 204 NLRB 396, 397, fn. 7 (1973), and cases cited therein. Karen Jones, with less than 3 months' experience as a press operator, may have been permitted to run "most" of her simple repeat jobs without supervisory approval; her testimony, to that effect, warrants no determination, however, that Respondent's management considered Dawes comparably privileged.

Of course, Respondent, herein, has not presented hard "evidence" calculated to define the particular standards which President Perelman may have applied, when determining that Dawes' conceded misrepresentation, vouchsafed to press operator LaVelle, constituted "dishonesty" within the contemplation of his firm's policy manual. However, nothing within the General Counsel's presentation, within my view, "casts any shadow" over Respondent's consistently maintained claim that the press operator was terminated solely because President Perelman considered his acknowledged "lie" more than a mere *de minimis* delinquency. The fact that Perelman's judgment—with respect to what type of conduct should be considered "dishonesty" sufficient to warrant discharge—might be considered harsh cannot, without more, impugn Respondent's contention that Dawes' termination derived from that judgment.

The General Counsel's representative has proffered no evidence, whatsoever, that some suspected or discovered misrepresentations by Respondent's employees, considered to be minor, have heretofore been inconsistently condoned, forgiven, or disregarded. Nothing within the present record, therefore, would support a determination that Dawes' conceded misrepresentation was treated with disparate severity.

If Respondent's management previously had condoned, ignored, or forgiven some suspected or conceded employee misrepresentations, credible proof with respect thereto would presumably have constituted direct evidence of whatever *de minimis* or threshold standard

President Perelman utilized when determining whether "dishonesty" sufficiently serious to trigger a discharge had been manifested. With such evidence lacking, however, Perelman's treatment of Dawes can hardly be deemed differentially discriminatory.

And, without such evidence, I cannot but find, upon this record, that Respondent has demonstrated preponderantly that President Perelman routinely enforces his firm's policy manual proscription with respect to dishonesty, relying on *subjective* judgments which this Board cannot properly "second guess" consistently with its statutorily defined mandate. See *Texas Instruments Incorporated* v. *N.L.R.B., supra*, in this connection.

Herein, Dawes has conceded, testimonially, that Respondent's president twice previously had manifested his determination that suspected or conceded "lies" with respect to matters of company concern, considered chargeable to company workers, might call forth a disciplinary reaction. Further, the press operator herein has effectively conceded—as I view the record—that, some 6 months before his discharge, President Perelman specifically had notified him that, should he "lie" regarding a company matter again, he would be terminated. Finally, Dawes' testimony, within my view, reflects his ultimate concession that, *when he was finally dismissed*, the firm's president did mention specifically his prior December 1979 warning that any further "lie" chargeable to the press operator would trigger such a disciplinary response. Since Perelman's *caveat* had been vouchsafed Dawes' several months before the press operator's commitment to promote Complainant Union's organizational campaign was first manifested, clearly that commitment cannot be said to have motivated the president's warning, or his discharge decision, which I have found consistent therewith and specifically predicated thereon. Compare *Peavey Company* v. *N.L.R.B.*, 648 F.2d 460 (7th Cir. 1981), denying enforcement of 249 NLRB 853 (1980), in this connection.

Upon this record,[1] therefore, I find that Respondent has sustained its burden of persuasion that Dawes would have been terminated, for the specific reason which President Perelman cited, even in the absence of the press operator's protected conduct as Complainant Union's protagonist. Likewise, I conclude—consistently with *Wright Line's* decisional rubric—that Dawes' discharge, therefore, flouted no statutorily defined proscription.

[Recommended Order for dismissal omitted from publication.]

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[1] Several transcript corrections, required, within my judgment, to render the record comprehensible, will be found listed within an appendix to this Decision. [Appendix omitted from publication.]